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NO REQUIEM FOR THE RESTRAINT DOCTRINE – YET

PEARSON NIHERERE*

1. INTRODUCTION

The decision of the Zimbabwean Supreme Court in the case of *Book v Davidson*¹ (hereinafter referred to as the *Book* case) like the notorious Scottish case of the snail in the ginger beer bottle,² is one of those cases which every student going through a course on the Law of Contract just must know. Not because it had anything to do with a dubious snail attaining jurisprudential immortality by virtue of exhibiting an anthropomorphic propensity for alcoholic beverages. No. The facts of *Book*'s case are quite unremarkable in fact. It is to be remembered because it (is supposed to have) changed the law. Before the decision in the *Book* case, Zimbabwean law on covenants in restraint of trade was one thing. After it, it is quite another — or is it?

One thing which is quite clear, even in the wake of the *Book* case, is that the restraint doctrine is still part of our law. It may not be as easy as it used to be to state what the restraint of trade doctrine says, but, be that as it may, the gist of the doctrine can, it is submitted, still be formulated without much trepidation. It is the rule that contractual provisions which purport to restrict a person's freedom to trade and/or work where and when she/he chooses with whomsoever she/he pleases, generally known as covenants in restraint of trade, are a class apart from other contractual terms. They are a category of contractual stipulations the enforceability of which is not dependent on consensus alone.³

It is open to a party to a restraint clause to challenge its enforcement on the grounds of unreasonableness. As regards contracts in general, once it is established that a term was freely and voluntarily agreed upon it is enforceable regardless of how unfair, harsh or unreasonable it might be. The cognate doctrines of freedom and sanctity of contract dictate that as the parties make their contract, so must they abide by it. But not so with covenants in restraint of trade.

Basically, it could be said that the law relating to covenants in restraint of trade has been changed by the *Book* case in four respects, namely:

1. the very formulation of the restraint doctrine itself;

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¹ Unreported judgment No. SC/67/88. Reference herein will be to the cyclostyled judgment.

² *Danoghue v Stevenson* [1932] AC 562.

³ Such vitiating elements as fraud, misrepresentation, duress, undue influence, mistake and lack of capacity are, for the purpose of this submission, regarded as going to the sufficiency of consent. Illegal contracts, of which covenants in restraint of trade can be said to be a sub-species, stand on a different footing. It should be noted that illegal contracts are unenforceable simply because they are illegal. Their reasonableness or unreasonableness is quite beside the point.

2. the question as to whether the onus of proof is on the covenantee or the covenantor to prove the reasonableness or unreasonableness (as the case may be) of a restraint;
3. the relevant date for assessing the reasonableness (or unreasonableness) of a restraint and
4. the standard, if any, to be applied in determining when a court may sever the unacceptable bits of a restraint clause so as to leave the acceptable ones which would then be enforceable.

In this article, it will be argued that —

1. on the facts of the case, the *Book* case was far from being the most satisfactory of decisions;
2. while there is no inconsistency between the conclusions arrived at and the reasons given for them, the reasons given as the basis for changing the law did not ineluctably lead to the conclusions reached. In short, the arguments were not as compelling as the Court seemed to assume;
3. inadequate analysis was given to the South African decisions which the court followed, the Zimbabwean cases which the court overruled, and the so-called English approach which the court rejected;
4. in the light of the court's own reasoning, there was really no need to depart from what had hitherto been understood to be Zimbabwean law and that
5. once the court had been so bold as to venture into the realms of judicial law-creation, it should have gone further than the South African courts and jettisoned the restraint doctrine altogether. The law as it is, without the restraint of trade doctrine, would be quite adequate to cater for the more excessive and objectionable versions of restrictive covenants or alternatively, that the court should have substituted a general unconscionability doctrine for the narrower rules governing covenants in restraint of trade.

2. THE LAW THAT WAS

Zimbabwean law as it was understood to be before the *Book* case (hereinafter referred to as the orthodox approach) was the same as English Law.⁴ South

⁴ For detailed discussion of English Law on the point, see Heydon, *The Restraint of Trade Doctrine*, Butterworths, London (1971); Treitel, *The Law of Contract* (6th Ed.), Stevens & Sons, London, 1983, pp.341–353; Cheshire, Fifoot and Furmston, *The Law of Contract*, (10th Ed.), Butterworths, London (1981), pp.351–370.

African law too was the same⁵ until 1984.⁶ Consequently, a discussion of the shaping and development of the modern English Law on restraint of trade could, by and large, be said to be a discussion of the development of the Zimbabwean orthodox approach.

The starting point for the modern English law on the subject is the decision of the House of Lords in the case of *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co.*⁷ In an often-quoted passage from Lord McNaughten's speech, the law was enunciated thus:

"The true view at the present time, I think, is this. The public have an interest in every person's carrying on his trade freely. All interference with individual liberty of action in trading, and all restraints of trade of themselves if there is nothing more, are contrary to public policy and therefore void. But there are exceptions. Restraint of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is sufficient justification, and indeed it is the only justification that the restraint is reasonable — that is in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public; so-framed and so-guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."⁸

For close on two centuries, before the *Nordenfelt* case, the leading authority on the enforceability of covenants in restraint of trade had been the judgment of Lord Macclesfield in *Mitchel v Reynolds*.⁹ This decision had been understood as having drawn a distinction between general restraints on the one hand, and partial

⁵ See generally Christie, *The Law of Contract in South Africa*, Butterworths, Durban, (1982), pp.352–368; Kerr, *Principles of the Law of Contract in South Africa* (3rd Ed.), Butterworths, Durban (1980), pp.109–131. Also see *Gordon v Van Blerk* 1927 TPD 770, *Durban Rickshas Ltd. v Ball* 1933 NPD 479 and *New United Yeast Distributors (Pty) Ltd. v Brooks* 1935 WLD 75. In *Van De Pol v Silvermann and Another* 1952 (2) SA 561 (A), the South African Appellate Division assumed, without decision, that the English rules of restraint of trade were applicable in South Africa.

⁶ The decision of the Appellate Division in *Magna Alloys and Research (Pty) Ltd. v. Ellis* 1984 (4) SA 874 (A) put the South African law beyond doubt. *Roffey v Catterall, Edwards and Goudre* 1977 (4) SA 494 (N) had caused some confusion by departing from the orthodox English approach in favour of what Didcott J. regarded as the Roman-Dutch approach. Between 1977 and 1984 there was confusion as the different provincial divisions went their separate ways. See, for instance, *Highlands Park Football Club Ltd. v Viljoen* 1978 (3) SA 191 (W); *Stewart Wrightson (Pty) Ltd. v Minniit* 1979 (3) SA 399 (C), *Madoo (Pty) Ltd. v Wallace* 1979 (2) SA 957 (T), *National Chemsearch S.A. (Pty) Ltd. v Borrowman and Another* 1979 (3) SA 1092 (T), and *Drewittens (Pty) Ltd. v Carley* 1981 (4) SA 305.

⁷ (1984) AC 535 (HL).

⁸ (*Supra*), at p.565.

⁹ (1711) 1P WMS 181.

restraints on the other. General restraints were automatically void, while partial restraints were, by their very nature, valid and enforceable. The *Nordenfelt* case did away with this dichotomy. As far as Lord McNaughten was concerned,

"All interference with individual liberty of action . . . and of trade are *prima facie* void." (Emphasis added).

This formulation did away with the distinction between general and partial restraints. A covenant in restraint of trade was a covenant in restraint of trade and that was that. Its enforceability or otherwise depended on the reasonableness test.

The law as laid down in the *Nordenfelt* case was applied by the House of Lords in *Mason v Provident Clothing and Supply Co.*¹⁰ and in *Herbert Morris Ltd. v Saxelby*.¹¹ The Judicial Committee of the Privy Council also followed the *Nordenfelt* case in *Attorney-General of the Commonwealth of Australia v Adelaide Steamship Co. Ltd.*¹² In *Herbert Morris Ltd. v Saxelby*, Lord Parker, having observed that it is against public policy to enforce covenants in restraint of trade unless there are special circumstances to justify such restraints, went on to say:

"The *onus* of proving such special circumstances must, of course, rest on the party alleging them."¹³

Thus, the rule was established that the *onus* of proving the reasonableness of a restraint lies on the person seeking to enforce it almost always the covenantee, in whose favour it is imposed.¹⁴

For the covenantee to discharge the *onus* on him/her to prove reasonableness, he/she had to establish that he/she had a legitimate interest to protect, and that the restraint clause was no more than adequate for the protection of that legitimate interest. Where the restraint formed part of a contract for the sale of a business, the good-will of the business purchased sufficed to constitute the legitimate proprietary interest for the protection of which a restrictive covenant could justifiably be imposed. As regards employer/employee relations, an employer could justifiably impose a restraint where he/she had trade secrets, trade connections or customers/clientele to protect.¹⁵

As has already been pointed out, these rules were adopted by our courts, and formed part of Zimbabwean law. In *Spa Food Products and Another v Sarif*¹⁶

¹⁰ (1913) AC 724 (HL).

¹¹ (1916) 1 AC 688 (HL).

¹² (1913) AC 781 (PC).

¹³ (1916) 1 AC 688 at 707.

¹⁴ *Van de Pol v Silvermann and Another* (*supra*) is an unusual case in that there, it was the covenantee who was arguing that the covenant in restraint of trade was unreasonable, and therefore unenforceable.

¹⁵ See *Herbert Morris Ltd. v Saxelby* (1916) 1 AC 688 (HL) at 710.

¹⁶ 1951 SR 279, 1952 (1) SA 713 (SR).

Beadle J. (as he then was) applied English law without any qualification. In fact, both counsel had cited English and South African authorities without, so it would seem, according to South African ones any greater weight.¹⁷ In *II, E. Sergay Estates (Pvt) Ltd. v Romano*, Goldin J. said:¹⁸

"All covenants in restraint of trade are *prima facie* - invalid and unenforceable unless the person seeking to enforce such a covenant proves, the *onus* is on the applicant, that the restraint is reasonable in the interests of both parties, not contrary to public policy and affords adequate protection, and no more than adequate protection of some proprietary interest owned by the applicant."

This was the approach taken by the General Division of the High Court of Rhodesia in *Rhodesian Milling Co. (Pvt) Ltd. v Super Bakery (Pvt) Ltd.*¹⁹ and *Biografic (Pvt) Ltd. v Wilson*.²⁰ The Zimbabwean Supreme Court followed suit in *Davies and Others v National Foods of Zimbabwe Limited*.^{21, 22}

The nature of the reasonableness test necessarily gave rise to the question as to the relevant date of assessing the reasonableness of a restraint. Would the reasonableness of a clause have to be tested by reference to the facts as they obtained at the time of the conclusion of the contract (the inception date rule), or by reference to the facts as they existed at the time the court was called upon to enforce the restraint? If the alternatives are couched in terms of the restraint being either valid or invalid, the obvious solution that suggests itself is that the reasonableness is to be assessed as at the date of the conclusion of the contract. A contract is either valid or invalid *ab initio*. The inception-date rule must, therefore, be the applicable rule. This was the position in England, South Africa²³ and Zimbabwe until the *Book* case. As Price J put it:²⁴

"if the validity of the restraint clause had to be tested by reference to the facts on any date other than the date when the agreement was made, the question of such validity would always remain uncertain. Events might interpose between the date of the contract and the date of the hearing of a case some of which might make a restraint clause invalid which was originally valid"

¹⁷ At p.714 of SA LR.

¹⁸ 1967 (3) SA 1 at 2.

¹⁹ 1973 (2) RLR 145, 1973 (4) SA 436 (R).

²⁰ 1974 (1) RLR 38, 1974 (2) SA 342 (R).

²¹ Unreported judgment No. S.C.150/87.

²² In *Commercial & Industrial Holdings (Pvt) Ltd. and Another v Leigh-Smith* 1982 (1) ZLR 246, 1982 (4) SA (226) the Zimbabwean Supreme Court expressly left open the question whether the onus is on the covenantee to prove unreasonableness or on the covenantor to prove reasonableness.

²³ In the South African case of *Aling and Streak v Olivier* (1949) (1) SA 215 (T), Price J. relying on English authorities, held that the inception-date rule was the one applicable in South Africa.

²⁴ *Aling and Streak v Olivier* (*supra*) at pp.219-220.

and then other events might occur to make that clause valid again. If the validity of the clause had to be determined by events which had occurred after the date when the contract was entered into, the enquiry would become arbitrary and artificial. The clause is valid or invalid *ab initio* and therefore the only facts that are relevant are the facts at the moment the contract is signed.”²⁵

In *Gledhow Autoparts Ltd. v Delaney* ²⁶ Diplock LJ (as he then was) expressed himself in these terms:

It is natural in those circumstances to tend to look at what in fact happened under the agreement. But the question of the validity of a covenant in restraint of trade has to be determined at the date the agreement is entered into.”

In *Pest Control (Central Africa) Ltd. v Martin and Another*,²⁷ Tredgold CJ took it as trite law that:

“The final test must be whether the covenant was reasonable when it was made.”

The Zimbabwean Supreme Court maintained this position in *Commercial and Industrial Holdings and Others (Pvt) Ltd. v Leigh-Smith and Others*,²⁸ a stance taken against the background of South African Provincial Division decision in which it had been held that the date of the hearing of the case, and not the inception date, was the relevant date for determining the reasonableness of a restraint. The court had been urged to follow these decisions — hence the following remark by Georges JA (as he then was):

“The view expressed by Price J. in *Aling and Streak v Olivier* (1949) (1) SA 216 (T) commends itself as soundly stated. I am not convinced, however, that the existing law is so plainly wrong in logic or in good sense that any radical departure is required.”²⁹

As regards the issue of severability, English Law, as enunciated in *Attwood v Lamont*,³⁰ accurately reflected Zimbabwean Law. In *Attwood v Lamont*, Lord Sterndale MR approved of, and applied, the “blue-pencil” test,³¹ adding that a covenant was severable only if it was, in effect, not a single covenant but several with the result that severance could be effected without changing the meaning and object which the parties themselves intended. Younger LJ put the same view thus:

²⁵ Also see *Allied Electric (Pty) Ltd. v Meyer and Another* 1979 (4) SA 325 (W).

²⁶ (1965) 3 All ER 288 (CA) at 295, (1965) 1 WLR 1366 (CA) at 1377.

²⁷ 1955 (3) SA 609 (SR) at 613.

²⁸ 1982 (1) ZLR 247, 1982 (4) SA 226.

²⁹ 1982 (4) SA 226 at 234.

³⁰ (1920) 3 KB 571 (CA).

³¹ At 578.

"... Where the covenant is not really a single covenant but is in effect a combination of several distinct covenants and where severance can be carried out without the addition or alteration of a word it is permissible. But in that case only."³²

This reluctance to temper with the parties' contract is in accordance with the Victorian strict constructionist approach to contracts. Any additions or alterations, so the argument goes, would be tantamount to making a contract for the parties. In the case of *Carthew-Gabriel v Fox and Carney (Pvt) Ltd.*³³ the Rhodesian Appellate Division would not enforce, in respect of the Greater Salisbury area only, a clause which purported to restrain an ex-employee from being employed in, carrying on a business, or having an interest in a business "in any way similar to the one of the company . . . within any area of Rhodesia in which the company is carrying on its business." It was clear that the Respondent Estate Agents carried on business in the Greater Salisbury area, that the Appellant had been employed in an office in the then Salisbury area, and that had the covenant been limited to the Greater Salisbury area, it would have been enforceable. But, as phrased, the restraint was too wide. There could be no severance without the addition or alteration of a word. Accordingly, there could be no severance. The court could not narrow down the clause for the parties. To do so would have been making a new contract for them. Such an exercise would not have been consonant with the rules as enunciated in *Attwood v Lamont*.³⁴

This was the orthodox approach to covenants in restraint of trade.

In 1977, in the case of *Roffey v Catteral, Edwards and Goudre (Pty) Ltd.*³⁵ Didcott J. (Friedman A.J. concurring) made a decision which, while falling quite short of a dint of "Denningesque" boldness, was to have quite some effect.³⁶ The

³² At 593.

³³ 1978 (1) SA 598 (RA).

³⁴ (*Supra*).

³⁵ (*Supra*).

³⁶ The English origins and non-Roman-Dutch character of the restraint doctrine had been commented upon before. Similarly, the propriety of slavishly following English law had also been questioned. See, *Edgecombe v Hodgson* 1902 (19) S.C. 224, 226, where De Villiers CJ said: "The question has never been pointedly raised whether and to what extent the English doctrine relating to restraints of trade is applicable in this colony." In *Katz v Efthymiou* (1948) (4) SA 603 (O) De Beer AJP had this to say at 610: "The rule that contracts in restraint of trade are generally to be considered as being in conflict with public policy is entirely foreign to the Roman and Roman-Dutch systems of law. . . . However, the doctrine has been ingrafted into our law and the only further difficulties which may arise are whether the doctrine is, in its entirety, to be applied by our courts even when certain branches are based on local considerations which do not prevail with us and whether our courts may in turn depart from the rigid application when considerations peculiar to South Africa present themselves." In *Van de Pol v Silverman and Another* (1952) (2) SA 561 (A), Greenberg JA said: at p.569: "The first defence rests on the contention that an agreement in restraint of trade is *prima facie* unenforceable. We were informed that counsel on both sides had not been able to find anything in Roman-Dutch law which prohibited or viewed with disfavour such agreements. . . . As far as I know, there has been no decision in this court on the point. . . ." Also see *S.A. Wire Co. (Pty) Ltd. v Durban Wire and Plastics* 1968 (2) SA 777 (D); *Diner v Carpet Manufacturing Co. of S.A.*

learned Judge categorically rejected the English Law of restraint of trade. In its place, he substituted a South African version of the restraint of trade doctrine. This culminated in the decision of the South African Appellate Division decision in *Magna Alloys and Research (Pty) Ltd. v Ellis*.³⁷ By and large, the Appellate Division endorsed the approach of Didcott J. In turn, *Magna Alloys and Research (Pty) Ltd. v Ellis* led to the decision in the *Book* case.

3. THE FACTS OF THE BOOK CASE

The Appellant (*Book*) had in 1983, purchased from one St. Claire Monro-Horn, the business of re-enamelling, polishing and restoring baths, which business was carried on under the name and style of Respo-Technik (Zimbabwe) Ltd. The said business was transferred to Appellant on the 1st of July 1983.

Soon thereafter, the Appellant found himself in financial difficulties. As a result thereof, Appellant sold to Respondent (Davidson) a half-share in the business. The parties (Appellant and Respondent) thereupon entered into a partnership the object of which was to:

"Continue and carry on the business presently carried on by *Book* under the name or style of Respo-Technik (Zimbabwe) in all its facets, but, particularly, as a re-enameller and restorer of baths."

Apparently, Appellant's financial difficulties did not go away. The partnership was dissolved on 24th May 1984 when the Appellant sold his half-share in the business to the Respondent.

Sometime in 1986, it came to Respondent's notice that the Appellant had entered into a partnership with one Larkins. The business of this partnership, trading as the Bath Doctor, was the re-enamelling, polishing and restoring of baths.

The Respondent (Applicant in the *Court a quo*) sought an interdict in the High Court restraining Appellant from breaching the terms of the covenant in restraint of trade contained in their partnership agreement. He also sought an order directing *Book* to make available to him all his books of account and other records relating to the conduct of his business (The Bath Doctor) to enable him to assess the damages he had been occasioned by the breach.

It is important to note that the restraint clause that Respondent was relying upon was contained in the memorandum of partnership of September 1983, and not the sale agreement of May 24, 1984.³⁸ The covenant in question was

Ltd. 1969 (2) SA 101 (D) at 103; Arthur Suzman, "The Contribution of English Law to South African Law, and the rule of law." 1968 (85) *SALJ* 90, at 91; and Kahn, "The Rules Relating to Contracts in Restraint of Trade Whence and Whither" 1968 (86) *SALJ* 391. Besides, Didcott J. did not have to fly in the face of an Appellate Division decision.

³⁷ (*Supra*).

³⁸ This point is not addressed by the Supreme Court.

contained in clause 12 of the memorandum of partnership which read in the pertinent part:

"Furthermore, neither partner shall, within three years from the termination of the partnership, and within the Magisterial province of Mashonaland, operate or engage in, or be interested in, whether directly or indirectly, any business or occupation involving the re-enamelling or restoring of baths or any other business carried out by the partnership."

In the High Court, the "restraint of trade" point was not Appellant's main line of attack. Instead, he argued that when he signed the memorandum of partnership, he was under the impression that the restraint was for a two-year period and not three. He had assumed, so it was contended, that the restraint provision in the memorandum of partnership was identical to the one contained in clause 9 of the agreement of sale between him and St. Claire Monro-Horn. In terms of that Clause 9, the seller of the business (St. Claire Monro-Horn) had been restrained from competing with the purchaser for a period of *two* years. Appellant was thus pleading mistake. He sought rectification of Clause 12 of the memorandum of partnership so that the clause would read: ". . . within two years from the termination . . ." Had the prayer for rectification succeeded, Appellant would then not have been in breach as the two year period from May 24 1984 had expired. Unfortunately for him, the prayer failed.

The submission that the restraint provision was unreasonably wide was made in the alternative. It was dealt with, as it were, in passing in Appellant's answering affidavit. It would seem that Manyarara J. (as he then was) did not give it much attention either.³⁹ It too failed. The Appellant appealed.

On appeal, the rectification point was abandoned. It was thought that it had no chance of succeeding. The reasonableness of the restraint was the only point in issue. For the Appellant, it was submitted on the basis of the orthodox approach, that the *onus* was on the Respondent, *qua* covenantor to establish the reasonableness of the restraint, to prove that it went no further than was reasonably necessary to protect the Respondent's legitimate proprietary interests. It was also contended, in the alternative, that even if it were to be held that the *onus* was on the Appellant to prove that the covenant was unreasonable, Clause 12 of the memorandum of partnership was clearly unreasonable. Respondent's counsel urged the Court to reject the orthodox English position and adopt the new South African "Roman-Dutch" approach. This argument carried the day. The South African decisions were followed.

4. THE QUESTION OF ONUS

The new Zimbabwean law, according to the *Book* case, is that the *onus* is now

³⁹ See unreported judgment No. IIC-II.476/86.

on the party resisting the enforcement of a covenant in restraint of trade to show that the restraint is unreasonable, and, therefore, unenforceable. The *onus* of proof has thus been shifted from the covenantee to the covenantor. The learned Chief Justice said: (at pp.18-19)

"The acceptance of public policy as the criterion means that when a party alleges that he is not bound by a restrictive condition to which he has agreed, he bears the onus of proving that the enforcement of the condition would be contrary to public policy."

He went on to say: (at p.20)

I am more than persuaded that it makes good common sense to place the onus of proof on the party that wishes to renege the contract (sic). Why should the onus not be on the person opposing the enforcement of the restraint? He must show why the restraint provision is unenforceable. He must tell the court why he says the restraint is unreasonable. I can see no good reason why it should not fall upon him to prove what he alleges is against his and/or the public interest."

As there was a long line of authorities⁴⁰ placing the *onus* of proof on the covenantee, it is submitted that the issue before the Supreme Court was not "Why should the onus not be on the covenantor" as the learned Chief Justice seems to suggest. On the contrary, the court had to be convinced that what had been held to be the law all along was clearly wrong. The decision in the *Book* case is a momentous one by any standards. It is one that should not have been made without compelling reasons. Yet, on looking for the compelling reasons on the strength of which the Supreme Court changed the law, they are not easy to find — if for no other reason than that the court itself did not take the trouble to articulate them with crystalline clarity.

In the above-quoted passage, it is said:

"The acceptance of public policy as the criterion *means* that when a party alleges that he is not bound by a restrictive condition to which he had agreed, he bears the onus of proving that the enforcement of the condition would be contrary to public policy."
(Emphasis added).

Of course, it would be presumptuous to be categorical about what the word "*means*" is meant to denote in this remark. If, as appears to be the case, what the

⁴⁰ See Footnotes 16-20 above. In *Commercial and Industrial Holdings (Pvt) Ltd. and Another v Leigh-Smith and Others* (*supra*), the question of onus was left open by the Zimbabwean Supreme Court. At p.231 of the S.A. Law Report Georges JA remarked that: "In Zimbabwe, as the learned judge *a quo* correctly pointed out, the decided cases have all held that the onus lies on the party seeking to enforce a covenant in restraint of trade to show that it is reasonable. There has, however, been no decision at Appellate level."

court meant is that the acceptance of public policy as the determining standard inevitably leads to, or dictates, the placing of the onus on the covenantor, it is most respectfully submitted that this line of reasoning is far from compelling. The mere fact that public policy is the criterion does not necessarily determine the issue of onus one way or the other. What is more important is what it is, exactly, that has to be proved. In any event, there was no question of "accepting", (for the first time as it were), public policy as the criterion in the *Book* case, or the *Magna Alloys* case for that matter. Public policy has, for a very long time indeed, been understood to be the basis of the rules relating to covenants in restraint of trade. As Lord McNaughten put it,⁴¹ "All restraints of trade of themselves, if there is nothing more are contrary to public policy and therefore void."⁴² Yet, the onus of proving the reasonableness of a restraint has always been on the covenantor.

What makes the difference is not so much the mere fact that public policy is the criterion, but the precise formulation of the policy-based rule. The orthodox view is that once a contractual provision has been categorized as a covenant in restraint of trade, it is against public policy and therefore invalid *unless* it is shown to be reasonable. In line with the general principle that he who avers must prove, the covenantor need not do anything in the first instance apart from merely showing that the contractual provision in question is indeed a covenant in restraint of trade. It would then be up to the covenantee to aver, and prove, that even though the clause in question is a restraint clause, it is, nonetheless, reasonable.⁴³ On the other hand the formulation could be that a restraint provision is valid and enforceable *unless* it is unreasonable on the grounds of public policy.

If this is the preferred formulation, then, assuming that the covenantee can show that there was *consensus ad idem* (otherwise the restraint doctrine would not be an issue), the onus would then be on the covenantor to establish unreasonableness.⁴⁴

But, in both instances, public policy is the criterion. It is the basis upon which covenants in restraint of trade are put into a category of their own, apart from

⁴¹ *Nordenfjelt v Maxim Nordenfjelt Guns and Ammunition Co.* (1894) AC 535.

⁴² At 565.

⁴³ The onus on the covenantor envisaged in this context is to show that a restrictive condition is one which does not only limit an individual's liberty to trade, but, also in restraint of trade in the sense of the doctrine (as opposed to the purely grammatical sense). While every covenant in restraint of trade involves a derogation from freedom to trade, not every derogation from freedom of trade is a covenant in restraint of trade. See *Esso Petroleum Co. Ltd. v Harper's Garage (Stourport) Ltd.* 1968 AC 269 (HL) (1967) 1 ALL ER 699 (HL) (1967) 2 WLR 871, cited with approval in *Rhodesian Milling Co. (Pvt) Ltd. v Super Bakery (Pvt) Ltd.* (*supra*). Also see *A. Schroeder Music Publishing Co. v Macaulay* (1974) 3 ALL ER 616 (HL).

⁴⁴ Even if the latter formulation is adopted, it does not necessarily follow that the *onus* of proof should be on the covenantor. It is not unheard of for the general rule that he who avers must prove to be departed from. For instance, in seduction cases, it is implicit in the woman's suit that she was a virgin at the material time. Yet, the onus is on the male alleged seducer to establish that she was not a virgin. See *Bull v Taylor* (1965) (4) SA 29 (A).

other contractual terms the enforceability of which may not be challenged on the grounds of reasonableness or unreasonableness. As for the weight of "good commonsense" as a reason for changing the law, it is submitted that in this context at least, the "good commonsense" should take into account the crucial question as to why our law should have a doctrine of restraint at all. Once the rationale for the doctrine has been ascertained, it makes lots of good commonsense to develop the rules relating to onus of proof in a manner that would best advance the policy rationale for the doctrine. Moreover, good commonsense should also take into account the type of evidence that a party would have to adduce to discharge the onus resting upon him/her. It is submitted that it would not make good commonsense to expect a party to discharge the onus upon him/her by establishing a series of negatives.

The effect of the *Book* case was to bring Zimbabwean law into line with South African law. Perhaps one of the reasons for the decision was just that — to bring Zimbabwean law into line with South African law. That the stance taken by the South African courts had a considerable impact on the decision in the *Book* case appears from Dumbutshena CJ's observation that:

"As long as the majority of South African Courts continued to follow the English approach, the Zimbabwean Courts were in good company. I say this because both countries have Roman-Dutch law jurisdictions. . . . this Court cannot, however, lightly ignore the decision in *Magna Allys and Research (Pty) Ltd. v Ellis (supra)* because Zimbabwe is still a Roman-Dutch common law country. Decisions of a court in another Roman-Dutch law jurisdiction have, in relative cases, very persuasive authority."⁴⁵

The stress on the "Roman-Dutch" character of the two jurisdictions here is rather disconcerting. It would appear that undue weight was given to the desirability of Roman-Dutch uniformity. The uniformity of laws between Zimbabwe and South Africa, Roman-Dutch as they both admittedly are, is not a virtue in itself. This is even more so in the area of covenants in restraint of trade. The restraint of trade doctrine is based on public policy which varies from place to place and from time to time. Once it has been accepted that Roman-Dutch law holds certain categories of contracts to be invalid and/or unenforceable on the grounds of public policy, the issue then becomes what public policy, in Zimbabwe, dictates at a given point in time. Thus, in the *Book* case, because the public policy point was obvious, the Roman-Dutch character of South African law was a matter of irrelevance. The issue at stake was not the interpretation or extrapolation of a text from Voet, Grotius or Van Der Linden. The question before the court was what public policy required in 1988 Zimbabwe, in the light of the prevalent political, moral and socio-economic conditions.⁴⁶ In the case of

⁴⁵ At p.11.

⁴⁶ It is not sought to be argued that the court was unaware of this point. The submission is that insufficient weight was given to these factors — in their Zimbabwean context.

*Drewittens (Pty) Ltd. v Carley*⁴⁷ Van Den Heever J. in rejecting the English approach reasoned thus:

A decision in the United Kingdom as to what would detrimentally affect the interests of the community is not necessarily valid for a community differently constituted . . . thousands of kilometres away."

As Dumbutshena CJ himself put it:

"I think what is required in Zimbabwe is the development of the law of restraint which accords with modern times and which is more appropriate to the circumstances now prevailing in the country."⁴⁸

Unfortunately, only lip-service seems to have been paid to this precept. Had due regard been given thereto, the comparison with South Africa would not have been on the basis of the Roman-Dutch character of the jurisdictions, but, on the relative economic conditions. If it is accepted that the relevant factors for consideration are the political, moral and socio-economic conditions and policy goals of a given community, it follows from that premise that there is no reason why Roman-Dutch authorities should be regarded as being any weightier than authorities from other jurisdictions. After opining that "the circumstances now prevailing in the country" were what the court had to have in mind when developing law, Dumbutshena CJ does not, regrettably, proceed to articulate what those "circumstances" were. What changes, if any, political, social, economic or otherwise had taken place which warranted the change in the law brought about by the Supreme Court in the *Book* case? *Ex facie* the judgment the court did not consider, let alone analyse, any such changes. If the court did take such factors into account, it must be assumed that they were considered *qua* "inarticulate major premise". The reasoning in the case would have been more convincing had the "prevailing circumstances" precept been better-developed and articulated. Otherwise, it is tempting to conclude that the Supreme Court took refuge behind that most confounded of weasel-words — public policy and vague generalizations on *laissez faire* and freedom of contract.

Insofar as the decision in the *Book* case was influenced by the South African decisions culminating in the Appellate Division decision in the *Magna Alloys* case, it is necessary to look to those decisions for the rationale behind the new approach. With regard to the question of onus, the South African decisions to consider are: *Roffey v Catteral*; *Edwards and Goudre*,⁴⁹ *Drewittens v Carley*,⁵⁰ and, of course, *Magna Alloys and Research S.A. (Pty) Ltd. v Ellis*.⁵¹ In the final

⁴⁷ 1981 (4) SA 305, at 311.

⁴⁸ At p.14.

⁴⁹ (*Supra*).

⁵⁰ (*Supra*).

⁵¹ (*Supra*).

analysis, three reasons are given for shifting the onus from the covenantee to the covenantor. They are the Roman-Dutch law argument, sanctity of contract, and, the idea that the appeal to public policy yields different results in the South African context as opposed to the English context in which the traditional restraint doctrine was developed. These reasons will be dealt with *seriatim*.⁵²

In *Roffey v Catteral, Edwards and Goudre*,⁵³ Didcott J. surveyed the historical development of the restraint of trade doctrine in English Law and concluded that:

“What originated as a contemporary reaction to specific problems in a particular historical setting hardened eventually into a fixed rule of law invalidating all covenants in restraint of trade. Roman-Dutch law, on the other hand, had no noticeable aversion to covenants in restraint of trade”

In *Drewittens (Pty) Ltd. v Carley*, Van Den Heever J. took the view that: “The doctrine that contracts in restraint of trade are generally to be considered as being in conflict with public policy is entirely foreign to the Roman-Dutch and Roman systems of law.”⁵⁴ The South African Appellate Division was of the same opinion in *Magna Alloys and Research S.A. (Pty) Ltd. v Ellis*⁵⁵, the headnote of which reads in part: “The approach followed in many South African judgments that a covenant in restraint of trade is *prima facie* invalid or unenforceable stems from English Law, and not our common law.”⁵⁶ As far as the Roman-Dutch authorities are concerned, the most quoted text in this regard is Voet 2.14.16,⁵⁷ which reads: “All honourable and possible matters may be made the subject of an agreement but not those contrary to public law nor those which might redound to the public injury.” The instances of contracts contrary to public policy given by Voet in the subsequent paragraphs do not include covenants in restraint of trade. The category of contracts in restraint of trade does not feature at all, hence De Villiers CJ’s comment in *Edgcombe v Hodgson*⁵⁸ that: “He (Voet) does not mention the encouragement of trade as a matter of public policy.”⁵⁹ The

⁵² The decision in the *Book* case was foreshadowed by the judgment of Greenland J. in *Mparadzi v Mangwana* (unreported judgment No. IIC.11/637/87), confirmed on appeal in *Mangwana v Mparadzi* (unreported judgment S.C.5/89). In *Davis and Others v National Foods of Zimbabwe Ltd.* (unreported judgment No. S.C.150/87) the orthodox approach was adhered to. It would appear that the *Magna Alloys* decision was not cited to the Supreme Court in *Davis and Others v National Foods of Zimbabwe Ltd.* (*supra*). It is interesting to note that *Davis and Others v National Foods Zimbabwe Ltd.* is not referred to in the *Book* case. Gubbay JA concurred in the judgment delivered by Manyarara JA in *Davis’* case, he also concurred in Dumbutshena CJ’s judgment in the *Book* case. The *volte-face* is not explained.

⁵³ (*Supra*) at p.501.

⁵⁴ (*Supra*) at p.310.

⁵⁵ (*Supra*).

⁵⁶ The *Magna Alloys* headnote is quoted on p.18 of the *Book* judgment.

⁵⁷ Gane’s translation, Volume 1 at p.428.

⁵⁸ (*Supra*) at p.226.

⁵⁹ *Edgcombe v Hodgson* (1902) (19) SA 224, at 226.

Roman-Dutch jurists are not, it is submitted, authority for shifting the onus from the covenantee to the covenantor. The best that can be said of the Roman-Dutch authorities is that their system did not have a restraint of trade doctrine at all,⁶⁰ and that they are silent on the question of onus. It is, therefore, incorrect to refer to the new approach as the "Roman-Dutch" approach.⁶¹ The conclusion supportable on a truly Roman-Dutch approach would have been that our law does not have a restraint doctrine at all.

The "Roman-Dutch" law argument is linked to the second justification for the new approach. This is the reasoning that because Roman-Dutch law did not have a restraint of trade doctrine, it gave pride of place to the notion of sanctity of contract. The argument is that in the conflict between freedom of contract on the one hand, and freedom to trade on the other, English law gives precedence to the promotion of freedom to trade. It is by virtue of this paramountcy given to freedom to trade, so the argument goes, that the restraint doctrine developed as it did in English law. On the other hand, Roman Dutch law gives precedence to sanctity of contract, with freedom to trade coming a poor second. Accordingly, the rules relating to contracts in restraint of trade could not be the same in the two jurisdictions as they start from different premises. In "Roman-Dutch" law, because sanctity of contract is considered to be more important than freedom of trade, it follows that once a contract has been freely and voluntarily entered into, it should be enforceable unless, and until it is shown to be contrary to public policy — not vice-versa. Didcott J.⁶² after discussing the two conflicting principles concludes that sanctity of contract shows itself to be: "The stronger in our jurisprudence than freedom of trade." He proceeds: "It (freedom to trade) is intrinsically the less compelling of the two ideas as I, at any rate, see things. People should keep their promises. That appeal for honour surely transcends all else of present relevance." Van Reenen J, no doubt, saw things the same way. He said: "The modern trend, however, is to have greater regard for such conditions as being conditions voluntarily agreed upon by the parties to a contract. Particularly under our system of law which pays great respect to the sanctity of contract, there is much to be said for upholding rather than repudiating them." He certainly had no sympathy for the reneging covenantor. In the view of the learned judge: "He was quite prepared to agree to these conditions when it suited his advantage, but now claims he is not bound thereby."⁶³ In *Muparadzi v Mangwana*⁶⁴ Greenland J. introduced his treatment of the issue of onus with the statement of principle that: "In my view, everything depends on which of two distinct approaches is adopted. The first approach, which may be termed the English approach, is concerned really with emphasising the promotion of free trade. The second approach, which may be termed the Roman Dutch approach,

⁶⁰ Kerr *op cit* p.116.

⁶¹ The new approach, according to which the restraint of trade doctrine is part of our law, but the onus of proving unreasonableness is on the covenantor, has no basis in Roman-Dutch sources. It is more of a South African than a Roman-Dutch law approach.

⁶² (*Supra*) at pp.505-506.

⁶³ *Mado (Pty) Ltd. v Wallace* (1979) (2) SA 957 (T) at 958.

⁶⁴ (*Supra*) at p.3.

is concerned really with emphasising the sanctity of contract." Greenland J. preferred the "Roman-Dutch" approach.

While it is argued that the significance accorded the notion of sanctity in Roman-Dutch law necessitates the shifting of the onus (to prove unreasonableness) on to the covenantor, it is noteworthy that the "sanctity" argument is never taken to its logical conclusion. Insofar as the restraint doctrine enables a party to resile, with impunity from a contract freely and voluntarily entered into on the grounds of unreasonableness, it is inconsistent with the high ground of sanctity of contract. If sanctity of contract is so important, why not jettison the restraint doctrine altogether? Neither in *Magna Alloys and Research S.A. (Pty) Ltd. v Ellis*⁶⁵ nor in the *Book* case was it suggested that the restraint doctrine should be rejected in the interests of sanctity of contract.⁶⁶ In fact, the appeal to the virtues of sanctity of contract is always qualified by the *caveat* that sight should not be lost of the "freedom of trade" tenet which lies at the root of the English restraint doctrine. In the words of Didcott J.⁶⁷

"One should not, however, overlook the impulse behind the English policy. It was the ideal that everyone should have the maximum freedom to trade and earn his livelihood when, where, and how he pleased which was taken seriously enough to be thought worthy of protection. The idea has a place in our ethos too."

The learned judge further remarks:⁶⁸

"The collision between these two ideas, freedom of trade and sanctity of contract, does not dictate the unqualified acceptance of one to the total exclusion of the other."

Dumbutshena CJ. juxtaposed the conflicting principles thus:⁶⁹

"It is in the public interest that agreements freely entered into must be honoured. However, it is also in the public interest that anyone must, as far as possible, be able to participate in the business and professional world."⁷⁰

The reluctance to take "sanctity of contract" to its logical conclusion and go for an out and out rejection of the restraint doctrine, and, the concomitant continuing conflict between freedom of contract and freedom of trade both raise

⁶⁵ (*Supra*).

⁶⁶ See *Book v Davidson (supra)* at p.5.

⁶⁷ (*Supra*) at p.504.

⁶⁸ (*Supra*) at p.505. Also see *Magna Alloys and Research S.A. (Pty) Ltd. v Ellis (supra)* at 890.

⁶⁹ At p.5.

⁷⁰ This is more of a restatement of the problem than an attempt to resolve it. The learned Chief Justice does not explain what factors are put into the scales to strike the right balance.

an important point. How significant is the change from the orthodox to the new approach? The recognition of the interplay between the two conflicting interests of public policy is certainly no new discovery. The problems posed by the attempt to reconcile the right to work with one's right to bargain has been around for quite some time. Lord Shaw addressed it in *Mason v Provident Clothing and Supply Co.*⁷¹ So, both the English and Roman-Dutch jurisdictions have been attempting to reconcile the two conflicting principles. At the end of the day, the compromise that has been reached, according to the new approach is that a covenant in restraint of trade is enforceable unless it is unreasonable. English law says a covenant in restraint of trade is unenforceable unless it is reasonable. It may well be that the difference between these two positions is no more than the difference between saying: "the bottle is half empty," and, "the bottle is half full."⁷² If, in the final analysis, this is in fact the case, the importance given to sanctity of contract as a basis for shifting the onus of proof for the covenantee to the covenantor is totally unwarranted.

Furthermore, the idea that Roman-Dutch law gives greater weight to sanctity of contract than does English law (which, supposedly, gives precedence to freedom of trade) is, it is submitted, fallacious. The English Law position is that it takes sanctity of contract as the starting principle.⁷³ However, sanctity of contract is not an absolute doctrine. There are exceptions to it. The restraint of trade doctrine is just one of those exceptions to the general notion of sanctity. It should be borne in mind that restrictive conditions will be enforced, notwithstanding the fact that they limit one's liberty to trade as long as those conditions are shown to be reasonable. In *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co.* (*supra*) the *locus classicus* on the subject as far as English law is concerned, the Court enforced a clause which restrained appellant from carrying on the trade in question anywhere in the world for a period of twenty-five years. Moreover, while every covenant in restraint of trade involves a derogation from freedom to trade, not every derogation from freedom of trade is under English law, a covenant in restraint of trade in the technical sense of the doctrine. English law distinguishes between, on the one hand, those contractual provisions which, whilst restricting an individual's freedom to trade, are not subject to the restraint doctrine, and, on the other hand, those provisions which are subject to it. The importance of the distinction lies in the fact that restrictive conditions which fall into the former category are not subject to the reasonableness test at all. The rules relating to covenants in restraint of trade are only applicable to the latter. Restrictive conditions fall into the former category if they are taken to have passed into the accepted and normal currency of commercial relations.⁷⁴ It is, therefore, an over-simplification of the issues to try to formulate

⁷¹ (1913) AC 724 at 739.

⁷² Whether this is, in fact, so depends on the precise formulation of the new approach. It can only be from the formulation that the degree of departure from the orthodox approach can be gleaned.

⁷³ See *Printing and Numerical Registering Co. v Sampson* (1875) LR 19 EQ 462, and *E. Underwood and Son Ltd. v Barker* (1899) 1 CII 300.

⁷⁴ See the cases cited in Footnote 43 above. None of the cases adopting the new approach discusses this dichotomy.

rules in terms of whether freedom to trade or sanctity of contract takes precedence over the other. In both systems, freedom and sanctity of contract form the *raison d'être* of the law of contract.

In neither system is sanctity of contract an absolute doctrine. That is why the sanctity argument is not taken to its logical conclusion. In both systems, the notion of sanctity necessarily exists against the background, and in the context, of wider considerations of public policy. The full ramifications of sanctity of contract must be considered in the light of, and be tempered by other societal goals.

The resulting rules are a product of the interaction and interplay of the various principles, policies and other societal goals. They cannot be dependent, solely on the order in which formulae appear in the hierarchy of principles and doctrines.

Even if it were to be accepted that sanctity of contract takes precedence over freedom to trade, it is not a necessary corollary of that stance that the onus should be on the covenantor to prove unreasonableness. A crucial factor in the determination of the question as to where the onus should lie is the *factum probandum*. This seems to have been overlooked in all the decided cases which follow the new approach. When it is said that the *onus* is on the covenantor to prove that the restraint clause is unreasonable, what facts, exactly, is she/he expected to place before the court to establish the unreasonableness of the restraint? According to the orthodox approach, it was incumbent on the covenantee to prove reasonableness. This she/he could do by showing that she/he had a legitimate interest to protect, and, that the restraint went no further than was reasonably necessary to protect that legitimate interest. This meant that the covenantee was required to prove a series of positive facts. For instance, where a restraint had been imposed upon an employee (or ex-employee as the case may be), it would be the covenantee/employer who would be better placed to tell the court what trade secrets and/or confidential information she/he sought to protect, and, how the restraint went no further than was reasonably necessary to afford that protection. Where the extension of the covenantee's business activities into new areas was in issue, it would be the covenantee/employer who would be best placed to inform the court that the restraint extended to areas Xyz because she/he intended to extend his/her business activities to areas Xyz. Accordingly, it made sense to place the onus on the covenantee. She/he would be required to prove a series of positive facts, some of which would be peculiarly within his knowledge.

As far as the new approach is concerned, what is it that the covenantor has to show to discharge the onus of proving unreasonableness? As has already been observed, this point is not squarely addressed in any of the decided cases. If there is nothing more to the change in the law than just the shifting of onus, then it is just a matter of looking at the other side of the coin. The covenantor would have to show that the covenantee had no legitimate proprietary interest to protect or that if there is such an interest, the restraint went further than was reasonably necessary to protect that interest.

This viewpoint seems to tally with the caution with which the change in the law has been attended. Should this be an accurate reflection of the new law, it is submitted that it is unsatisfactory as it places upon the covenantor, a burden to establish a series of negatives.⁷⁵ Needless to say there would be cases in which the covenantor concerned would be able to establish the relevant negative facts. At the same time, it is by no means stretching the imagination too far to envisage a situation in which, in essence, the covenantor would be required to show that he acquired no trade secrets or confidential information, or, that the covenantee had no intention of extending his/her business activities into a new area. Because of the nature of the *factum probandum*, it is submitted that the best that a covenantor could do in such a case is just to aver that she/he acquired no trade secrets, or, that the covenantee was not, in fact, trading in a particular area. Would this be sufficient to discharge the onus? If so, then we are back to the orthodox position. The burden would have shifted onto the covenantee to show what trade secrets he sought to protect and why. Alternatively, the other manner in which the covenantor could discharge the *onus* would be by laying out in an affidavit, all the information acquired during the period of employment, and, in the final paragraph/s, aver that the information, read as a whole or in part/s does not constitute a trade secret (or trade secrets) and, therefore, warrants no protection. The practical inconvenience that such an approach would cause makes it absurd. Further problems are not hard to envisage. The covenantor could aver that she/he acquired information xyz, which does not constitute a trade secret, only for the covenantee to say that she/he acquired information abc as well, which is a trade secret. The conclusion is inescapable that, to put it mildly, it is not expedient to place the onus of proving unreasonableness on the covenantor, if what she/he is required to prove is that the covenantee had no legitimate proprietary interest to protect, or that even if there was such a legitimate interest, the covenant went further than was reasonably necessary to protect it.

On the other hand, the new approach could be interpreted in such a manner as to accord greater significance to the much-adulated sanctity of contract. The essence of sanctity is that parties are bound by their contract because they agreed to it. Whether or not there was any good, valid underlying reason for entering into that contract is irrelevant. Consequently, if the covenantor agrees to a restraint provision he is bound simply and precisely because he/she agreed to it. Whether or not the covenantee had any legitimate proprietary interest to protect is neither here nor there. The covenantee would, on the premise, even be entitled to protection against competition *per se* if she/he stipulates for it.⁷⁶ Besides, it could be said that the covenantee has paid the price for the other party's forbearance. The employee's remuneration is that much higher because she/he agreed to the restraint clause. The seller gets a higher price for his/her business because she/

⁷⁵ See Kerr *The Onus of Proof in Restraint of Trade Cases* 1979 (96) SA Law Journal p.545.

⁷⁶ According to the traditional restraint doctrine, a covenantee cannot protect himself against competition *per se*. There has to be a legitimate proprietary interest to protect. It is not clear what the position is under the new law. In *Mparadzi v Mangwana* (*supra*), Greenland J. was of the view that due to the paramountcy of sanctity, a covenantee could, according to the new approach, protect himself/herself against competition *per se*. The *Book* case is silent on this point.

he agrees not to compete with the purchaser. If the sanctity argument is taken this far, it would necessarily follow that the covenantor would be required to discharge the onus on him/her by adducing evidence of facts pertaining to him/her or the public. The covenantor would establish unreasonableness by showing that enforcing the restraint would be unduly harsh or unfair on him, or have devastating consequences on the public interest. This is quite different from requiring him/her to prove facts pertaining to the business interests of the covenantee. If this is the new approach, it does make good commonsense to put the onus on the covenantor as she/he would be required to prove positive facts.

The Roman-Dutch and sanctity arguments apart the other justification for the change in the law is that the relevant economic conditions in England are not the same as those in South Africa⁷⁷ and Zimbabwe. As economics is one of the bases, if not the basis, of the restraint doctrine, this would be a sound argument — if proven. The economic analysis that went into the cases that have been decided to date leaves more than a little to be desired.⁷⁸ Didcott J. does a brief survey of the historical development of the restraint doctrine in England. However, his judgment is unsatisfactory when it comes to comparing the economic conditions prevailing in South Africa in 1977 and those obtaining in 1894 England, or, better still, 1977 England. With the Zimbabwean scenario, there are no concrete comparisons with England either. The adoption of the South African position would seem to suggest that at the very least, the economic circumstances and policy goals of Zimbabwe and South Africa are similar. Whether or not this was the court's assumption, no statistics, facts or figures are given to support the economics argument. The impression that is created is that only lip-service was being paid thereto. It is submitted that at the end of the day the Supreme Court failed to sufficiently justify the shifting of the *onus* from the covenantee to the covenantor.

5. THE RELEVANT DATE FOR DETERMINING UNREASONABLENESS

Where the unreasonableness of a restraint is in issue, the surrounding circumstances are no longer to be taken, as was the case under the orthodox approach, as at the time of the conclusion of the contract. Instead, the unreasonableness is to be determined in the light of the circumstances prevailing when the court is asked to enforce the restraint. This would appear to be the new position, as laid down in the *Book* case. This stance would be in line with the Supreme Court's preference for the new South African approach as enunciated in *Magna Alloys and Research S.A. (Pty) Ltd. v Ellis*⁷⁹ as against the orthodox approach. However,

⁷⁷ See *Roffey v Catterall, Edwards and Goudre (supra)* at pp.499–501; *Drewittens (Pty) Ltd. v Carley (supra)* at pp.311–312, *Book v Davidson (supra)* at p.14.

⁷⁸ It is submitted that the best attempt at looking at the economics argument is by Squires J. in *Commercial and Industrial Holdings (Pvt) Ltd. and Another v Leigh-Smith and Others* 1981 ZLR 647, at 664–665. On appeal, Georges JA said of the attempt: "The approach is original and also attractive and it is with some regret that I find myself unable to agree." No reasons are given for the failure to agree, let alone those of an economic nature.

⁷⁹ (*Supra*).

the pronouncements of the court on this aspect of the matter have to be taken with a pinch of salt as they were, it is submitted, *obiter*. As far as the court itself was concerned, the sole issue for decision was the question of onus. On p.4 of the judgment, Dumbutshena CJ says: "The importance of this appeal rests on the question of onus of proof in cases in which the enforcement of a restraint of trade provision contained in any assessment is in issue." The point is reiterated on p.8 where the learned Chief Justice says: "As already pointed out above, this appeal is solely concerned with the onus of proof." In the light of these remarks, it can be safely said that whatever was said with regard to the relevant date for assessing the unreasonableness of a clause was *obiter*. This is borne out by the manner in which the preference for the new South African approach is phrased. It is put thus:

"Speaking for myself, I find it logical and just that the proper time to assess the restraint that is being challenged is *at the time the court is asked to enforce or not to enforce the restraint*. The court can then take into account the relevant circumstances. In my view, that is the time when the reasonableness of the restraint can properly be assessed".⁸⁰ (Emphasis is mine).

In South Africa, the inception-date rule had been rejected in *National Chemsearch S.A. (Pty) Ltd. v Borrowman and Another*,⁸¹ *Drewittens (Pty) Ltd. v Carley*,⁸² and *Magna Alloys and Research S.A. (Pty) Ltd. v Ellis*.⁸³

It is most respectfully submitted that on the facts of the *Book* case, the Supreme Court erred in treating this matter as not being relevant to its decision. The question of onus was not the only issue at stake. The facts of the case were that the restraint provision that the Respondent was relying upon was contained in Clause 12 of the memorandum of partnership of September 1983. In May 1984, there was the agreement in terms of which the partnership was dissolved and Appellant sold his half-share in the business to Respondent. Enforcement of the restraint was sought (in the High Court) in October 1986. The reasonableness or otherwise of the restraint might well have been viewed differently depending on which one of the three dates was chosen as the relevant date. The nature of the case created the real danger of it being assumed that the restraint clause was contained in the sale agreement of May 1984 whereunder Appellant sold his half share in the business to Respondent. On this basis, the sale of the good will of the business would be a very strong factor weighing in favour of the finding that the restraint was a reasonable one. If the date of hearing had been held to be the relevant date, then the court would have been entitled to take into consideration the May 1984 sale and the circumstances surrounding it. On the other hand, if the inception-date rule applied, the court would not have been entitled to take the

⁸⁰ (*Supra*), at p.8.

⁸¹ (*Supra*).

⁸² (*Supra*).

⁸³ (*Supra*).

1984 sale into account. The court would have had to consider the situation as it was at the time when the memorandum of partnership was signed.⁸⁴

In fact, Appellant's alternative argument was that even if the onus were on him to establish the unreasonableness of the restraint, it was clearly unreasonable if viewed as at the time of the conclusion of the partnership agreement in September 1983.⁸⁵ It was implicit in this argument that if the onus were on the Appellant, and, further, the relevant date for determining unreasonableness was the date of hearing, he (the Appellant) had no case. In the light of this argument, it was, therefore, necessary for the Supreme Court to decide whether the inception-date rule had been overruled.⁸⁶

While expressing a preference for the "hearing-date" rule, it would appear that Dumbutshena CJ could not bring himself to abandon completely, the reasoning entailed by the orthodox inception-date rule. Clause 12 of the parties' memorandum of partnership also provided that: "... The partnership hereby agrees that this restraint is reasonable ... " The learned Chief Justice seems to have set much on this stipulation. After citing the above-quoted except, he comments: "The Appellant has not cast any doubts on the sentiments expressed in the restraint provision."⁸⁷ Surely, the words of the contract are an indication of what the party had in mind at the time of contracting. Accordingly, what the covenantor thought as to the reasonableness of the restraint at the time of contracting is relevant, if at all, if the surrounding circumstances are to be considered as at the date of the conclusion of the contract.

In *Commercial & Industrial Holdings (Pvt) Ltd. and Another v Leigh-Smith and Others*,⁸⁸ Georges JA (as he then was) declined to follow *National Chemsearch S.A. (Pty) Ltd. v Borrowman and Another*⁸⁹ and *Drewitts (Pty) Ltd. v Carley*.⁹⁰ He was not convinced that the decision in *Aling and Streak v Oliver*⁹¹ was plainly wrong.⁹² Dumbutshena CJ (in his *obiter dictum*) prefers the hearing-date rule on the grounds of justice and logic. It is not clear whether, unlike Georges JA, he is convinced that the old law is plainly wrong. In fact, depending on the precise formulation of the new rule, the question as to the relevant date for assessing unreasonableness may well be a non-issue. According to the orthodox

⁸⁴ See the remarks of Diplock LJ (as he then was) in *Gledhow Autoparts Ltd. v Delaney* [1965] 3 ALL ER 288, at 295, (1965) 1 WLR 1366, at 1377.

⁸⁵ Mr. D.A.B. Robinson who was counsel for the Appellant in this case is a colleague at the University of Zimbabwe's Law Faculty. I had access to his record of the case — particularly his heads of argument.

⁸⁶ The court did not proceed to the stage of applying the law to the facts. Thus, the question whether Appellant had discharged the onus of proving unreasonableness was not addressed.

⁸⁷ At p.20.

⁸⁸ (*Supra*).

⁸⁹ (*Supra*).

⁹⁰ (*Supra*).

⁹¹ 1949(1) SA 215.

⁹² (*Supra*) on p.234 of the S.A. Law Report.

approach, a covenant in restraint of trade is *prima facie* invalid. To add "and unenforceable" is superfluous. There can be no question of enforcing an invalid agreement. Once the restraint which is *prima facie* invalid is shown to be reasonable, it is valid. The dichotomy is between validity and invalidity. As long as one is thinking in terms of these two alternatives, the relevant date must be the time of the conclusion of the contract. A contract is either valid or invalid at its inception.⁹³ Under the so-called Roman-Dutch approach, a covenant in restraint of trade is *prima facie* valid, and, therefore, enforceable. But what is the consequence of proving the restraint to be unreasonable? This again, is a matter of how far the sanctity argument is to be taken. The position could be that a covenant that has been shown to be unreasonable is invalid. This would be retaining the orthodox valid/invalid dichotomy but simply reversing the order. On the other hand, the new approach could be that subject to the other vitiating elements applicable to contracts in general, a covenant in restraint of trade is always valid. Proof that it is unreasonable does not render it void. The effect of such proof is to make this clause unenforceable at that particular point in time because of the impact such enforcement would have on the public interest. Strictly speaking, it would be erroneous to talk of the clause being "unreasonable" in the context of this view of the law. It would be more accurate to say that it is the enforcement of the clause which would be unreasonable. The issue would then be what the consequences of enforcing the covenant would be. If this is the question to be addressed by the court, it becomes unnecessary to decide whether the surrounding circumstances should be looked at as at the date of the agreement, or, some other later date. Van Den Heever J.⁹⁴ favours this latter formulation of the new approach. She says: "The contract is always valid. The only inquiry is whether the court should compel compliance with a particular agreement or not, at a given time." This passage is cited with apparent approval in *Magna Alloys and Research S.A. (Pty) Ltd. v Ellis*.⁹⁵ While the *Book* case most certainly follows the new South African approach to the restraint of trade doctrine, it is not clear whether the Supreme Court adopted the former, or the latter formulation of the new approach. If the Van Den Heever formulation is what the Supreme Court decided in favour of, then it was inaccurate to say that the sole question for determination was that of *onus*. The issue was more fundamental than that. It went to the very root of the restraint doctrine. However, if the starting premise is that the *Book* case was solely concerned with the issue of *onus*, it follows that the position in Zimbabwe is that a covenant in restraint of trade which has been shown to be unreasonable is not only unenforceable, but, it is also invalid. On this basis, the assessment date is an issue.

⁹³ All the cases decided in favour of the inception-date rule are premised on the assumption that the clause is either valid or invalid.

⁹⁴ See *Drewittens (Pty) Ltd. v Carley (supra)* at pp.312-313. In *Magna Alloys and Research S.A. (Pty) Ltd. v Ellis (supra)* at pp.891-893, the Appellate Division seems to be agreeing with Van Den Heever J. that an unreasonable restraint clause is not void, but only unenforceable. However, the headnote of the case reads in part: "When a party alleges that he is *not bound* by a restrictive condition." (emphasis added). It is submitted that there is an inconsistency. If the clause is always valid, there is no question of the covenantor not being bound to it. The fact that the court may decline to enforce the provision at a particular point in time does not mean that the covenantor is not bound thereby.

⁹⁵ (*Supra*).

The distinction between a clause that is invalid, and one that is valid but unenforceable is not just a matter of semantics. There are at least two remedies that a covenantee may obtain in respect of the breach of a covenant in restraint of trade. She/he could either seek an interdict restraining the covenantor from doing what he agreed not to do, and/or damages. If an unreasonable restraining clause is invalid, the covenantee would be entitled to neither an interdict, nor damages therefor. There is nothing to enforce. With a provision that is valid but unenforceable, it is submitted that it is necessary to decide what is meant by "unenforceable." If what renders a covenant unreasonable is the injury that would be caused to the public interest by granting an interdict in respect thereof, all this means that the covenant is "unenforceable" in the sense of an interdict being granted. It need not necessarily follow that damages may not be awarded in respect thereof. If an award of damages would not be injurious to the public interest, it is submitted that there would be no reason why damages should not be awarded. Thus, if a clause is valid it may be "unenforceable" in the sense of granting an interdict, to compel compliance therewith, but enforceable in so far as the covenantee may be entitled to damages. Van Den Heever J's formulation is couched in terms of: "... whether the court should compel compliance..." This is redolent of ordering specific performance. An interdict is the equivalent of an order for specific performance in the context of covenants in restraint of trade. The only remedy sought in *Drewittens (Pty) Ltd. v Carley*⁹⁶ was an interdict. Similarly, the case of *Cape Can (Pty) Ltd. t/a Canon Western Cape v Van Nimwegen and Another*⁹⁷ did not give Van Den Heever J. an opportunity to expound on the new South African approach *vis-à-vis* the remedy of damages. It too was concerned with an interdict. In any event, the covenantees succeeded in both cases with the result that even if damages had been sought, it would have been unnecessary to consider the possibility of a restraint clause being "unenforceable" in the sense of granting an interdict, but, "enforceable" in the sense of awarding damages therefor. It is submitted that cases in which an award of damages would be detrimental to the public interest would be hard to come by.

6. SEVERABILITY

Whatever was said in the *Book* case with regard to severance was, no doubt, also *obiter*. In the view of the court, the sole question for decision was that of onus. Further, severance did not arise on the facts of the case. It is, however, worth noting that on p.18 of the judgment, Dumbutshena CJ, quoting from the headnote of the *Magna Alloys* case, approved of the new "partial enforcement" approach. This means that where a covenant as drafted, is unreasonably wide, the court may enforce it to the extent that it is reasonable to do so regardless of whether or not the notional "blue-pencil" could be applied to the clause. A good example of "partial enforcement" appears in *Mparadzi v Mangwana*,⁹⁸ in which the matter arose squarely for decision. There, Greenland J. reduced a five-year restraint period to three years and interdicted the covenantor/respondent in terms of the parties' contract, but, for three years instead of the stipulated five years.

⁹⁶ (*Supra*).

⁹⁷ 1988 (2) SA 454.

⁹⁸ (*Supra*).

Greenland J's judgment was confirmed on appeal.⁹⁹ Consequently, the "blue-pencil" test is for us now a matter of history. The orthodox "blue-pencil" test was too mechanical, formalistic and illogical. Very few, if any, will lament its demise.

In fact, if the law is that proof of unreasonableness does not render the contract void, but merely unenforceable, the issue of severability also falls away. The question would not be the extent to which a given contract is invalid, or, whether certain unacceptable bits of a contract should be rejected. The matter for the court would be the extent to which it is prepared to enforce the agreement. This is not unique to covenants in restraint of trade. Where specific performance of a contract is concerned, the court always has a discretion with regard to the order it will make. The "partial enforcement" of a covenant in restraint of trade falls fairly and squarely within the ambit of that discretion. Indeed, the sooner the phrase "partial enforcement" is not raised to the status of a doctrine the better. The phrase means no more than that the court need not grant an order exactly as prayed.

7. MAY THE ANACHRONISTIC REST IN PEACE

The rejection of the orthodox English version of the restraint doctrine, and the adoption of the new South African approach poses two questions:

1. what is left of the restraint doctrine: and
2. should anything be left of it?

The issues germane to the first question have already been canvassed. What is left of the restraint doctrine is, in the first instance, a matter of the precise formulation of the new rule. In the second, much depends on what the covenantor now has to establish to sustain his/her prayer that the covenant be not enforced. What constitutes an "unreasonable" impact on the public interest? What degree of damage to the public interest would warrant a denial of enforcement? It must be borne in mind that the court may, in a proper case, refuse to grant a decree of specific performance.¹⁰⁰

Since an interdict is the equivalent of an order of specific performance, some restrictive conditions might fall under this general rule, as distinct from the special rule applicable to covenants in restraint of trade. The question would then be whether the basis on which a decree of specific performance may be denied, as a general rule, is different from the "unreasonableness" or "detriment to public interest" criterion under the restraint doctrine. If the criteria are the same, the restraint doctrine has become a superfluity. It is submitted that there is no need for a separate and different standard under the restraint doctrine. If there is to be any substance to the pride of place accorded to sanctity of contract, the law must

⁹⁹ See *Mangwana v Mparadzi* unreported judgment No. S.C.5/89.

¹⁰⁰ See *Farmer's Co-operative Society v Berry* (1912) AD 343, and *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 170.

be that the court will refuse to enforce a restraint provision only in circumstances where the consequences of such enforcement would be really drastic. They must be so drastic that in any event, the court would have exercised its discretion not to enforce the provision in terms of its general discretion. This would obviate the need for a special rule per restraint of trade doctrine. In all the decided cases, to date, in which the new approach has been applied, the covenantee succeeded. The result is that the courts are yet to give an indication as to what sort of circumstances would justify the conclusion that a covenant should not, in the circumstances of the case, be enforced.

In the final analysis, the decision in the *Book* case leaves the law in a more unsatisfactory state than it was in before. The law has been changed. That much is clear. But, because of the focus on the issue of onus, and the scant regard paid to the underlying rules, it is not clear to what extent the orthodox approach has been replaced by the new. As the restraint doctrine itself was not rejected in terms, it is still part of our law. Further, support for this proposition is to be found in the subsequent Supreme Court decision in *Mangwana v Mparadzi (supra)*. What has changed is where the onus lies. Apart from that, there are many loose ends still to be tied. It is submitted that if the Supreme Court was satisfied that there was merit in the restraint doctrine, it should have retained the orthodox approach. On the other hand, if it deemed it fit to change the law on the point, it should have jettisoned the doctrine altogether. The restraint of trade doctrine ill-comports with sanctity of contract. Besides, it serves no useful purpose.

The basis of the restraint of trade doctrine has tended to change from time to time. In medieval times, the doctrine was justified on the grounds that a covenant in restraint of trade impinged on the individual's liberty as embodied in the Magna Carta. In Elizabethan England, it served to prevent the creation of monopolies.¹⁰¹

In *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co. (supra)* Lord McNaughten saw the rationale of the doctrine as being that "The public have an interest in every person's carrying on his trade freely, so has the individual." In terms of this justification, the doctrine is intended to protect the restrained individual himself, and the public in so far as it has an interest in that individual's ability to carry on his trade as he pleases. This, it would seem, is the accepted rationale in Zimbabwe today.¹⁰²

As far as the protection of the individual's own interest is concerned, the restraint doctrine is totally unwarranted. The individual is free to work as he pleases. To be able to bargain away part of that freedom is, it is submitted, a facet of his/her enjoyment of that freedom. In seeking to protect the would-be covenantor, the law is adopting a paternalistic approach which is quite uncalled for. If a party is restrained from engaging in one line of business he/she can

¹⁰¹ For the historical development of the restraint of trade doctrine in Anglo-American jurisprudence, see Heydon, *The Restraint of Trade Doctrine*, Butterworths, London, (1971), pp. 1-37 and, Harlan M. Black, "Employee Agreements not to Compete" 1959 (6) *Harvard Law Review*.

¹⁰² See *Book v Davidson (supra)*, p.5.

always engage in another. As the law's concession to paternalism, the protection of the poor, pathetic individual against his/her own folly, the restraint doctrine is both inadequate and inappropriate. There is no reasonable justification for being paternalistic with regard to covenants in restraint of trade whilst adopting a hands-off non-interventionist attitude with regard to contractual provisions in general. Consequently, the restraint of trade doctrine is too narrow as regards the class of contractual terms to which it applies. Worse still, it does not even purport to serve the weakest members of society who are most in need of the paternalistic protection of the law. Illiterate persons who sign documents the contents of which they do not appreciate are bound by virtue of the *caveat subscriptor* rule, their illiteracy notwithstanding. In its fidelity to classical liberal conceptions of formal freedom of choice, the law does not regard inequality of bargaining power, or any other form of economic pressure, as a good enough reason for not abiding by the terms of one's contract. The paternalism and/or interventionism of the restraint of trade doctrine is, therefore, rather incongruous. It is hard to justify. This is even more so in the light of the fact that by and large, the party who is likely to benefit from the restraint doctrine is the type of person (natural or juristic) who should be better-equipped to manage his/her own affairs. To take a brief survey of the Zimbabwean decided cases, in *Spa Food Products v Sarif*¹⁰³ the Respondent/covenantor was another manufacturer of cordials, minerals and other aerated waters. In *H.E. Sergay Estates v Romano*¹⁰⁴ the covenantor had been employed as an assistant in an estate agency business. In *Rhodesian Milling Co. (Pvt) Ltd. v Super Bakery (Pvt) Ltd.*,¹⁰⁵ *Biografic (Pvt) Ltd. v Wilson*,¹⁰⁶ *Commercial & Industrial Holdings (Pvt) Ltd. and Another v Leigh-Smith and Others*¹⁰⁷ and, the *Book* case itself, the parties seeking to avoid their contractual obligations were all persons engaged in apparently thriving business ventures. It could hardly be argued that any of the covenantors involved in these disputes was the paradigm case of the weak, pathetic, exploited individual desperately in need of the paternalistic protection of the law.

Courts have tended to regard restraints imposed on employees (and ex-employees) with greater disfavour than other covenants. This attitude is premised on the assumption that the would-be employee is always in a weaker bargaining position when compared to the prospective employer, with the result that the latter would be in a position to dictate unfair terms which would otherwise be unacceptable to the former.¹⁰⁸ This argument would seem to represent the strongest case for the retention of the restraint of trade doctrine. However, it is submitted that even the employer/employee relationship does not justify the existence of the restraint of trade doctrine, less still its retention. It could hardly

¹⁰³ (*Supra*).

¹⁰⁴ (*Supra*).

¹⁰⁵ (*Supra*).

¹⁰⁶ (*Supra*).

¹⁰⁷ (*Supra*).

¹⁰⁸ See Per Lord Atkinson in *Herbert Morris Ltd. v Saxelby* 1916 (1) AC 688 (HL), at 701, *Roffey v Catterall Edwards and Goudre* at pp.494-495, *Commercial and Industrial Holdings (Pvt) Ltd. and Another v Leigh-Smith and Others* (*supra*) p.235 S.A. Law Report, and *Harlan M. Black op cit*.

be gainsaid that the phenomenon of inequality of bargaining power is by no means unique to employment contracts. Accordingly, any rule of law intended to remedy the iniquities of inequality of bargaining power would have to be a general one, applicable not only to the employment contract but to any other contract as well. The position at the moment is that the court is prepared to consider the reality of inequality of bargaining power as far as the covenant in restraint of trade is concerned, but not in respect of any other term or condition of that contract. As the chances are that an employer with superior bargaining power would exert it with generous liberality, the only justification for placing restrictive conditions on a different footing would be that if enforced, their impact would be far more drastic than that of any other unfair term. This argument loses its weight if due regard is had to the class of employee likely to be restrained. It is submitted that an employer is not likely to impose covenants in restraint of trade willy-nilly on unskilled general labourers and semi-skilled workers. No purpose would be served by it. The economic costs of drafting all the elaborate provisions could not be worth it. The employee who is likely to be restrained is one who would be relatively high up in the hierarchy of an organisation, high enough to have access to confidential information and trade secrets. The nearer an employee is to the echelons of power in an organisation, the more she/he is likely to be restrained, and, the less paternalistic protection she/he needs. The eventuating situation is an interesting paradox: the more an employee is likely to have a covenant in restraint of trade imposed on him/her, the less paternalistic protection that employee needs the more an employee is in need of paternalistic protection, the less that employee is likely to be a covenantor.

In *A. Schroeder Music Publishing Co. v Macaulay*, Lord Diplock based the restraint doctrine fairly and squarely on the iniquities of inequality of bargaining power. He observed that:

“What your Lordships have been doing is to assess the relative bargaining power of the publisher and the song-writer at the time the contract was made and to decide whether the publisher had used his superior bargaining power to exact from the song-writer promises that were unfairly onerous to him. Your Lordships have not been concerned to inquire whether the public have in fact been deprived of the fruits of the song-writer’s talents by reason of restrictions, nor to assess the likelihood that they would be so deprived in the future if the contract were permitted to run its full course. It is in my view salutary to acknowledge that in refusing to enforce provisions of a contract whereby one party agrees, for the benefit of the other party, to exploit, or refrain from exploiting, his own earning power, the public policy which the court is implementing is not some nineteenth century economic theory about the benefit of the general public of freedom of trade, but the protection of those whose bargaining power is weak against being forced by those whose bargaining power is strong, to enter into bargains that are unconscionable.”¹⁰⁹

¹⁰⁹ *A. Schroeder Music Publishing Co. v Macaulay (supra)* at p.623.

The rejection of the fallacy of freedom of contract implicit in Lord Diplock's remark is commendable. It would be more commendable if this rationale for refusing to enforce covenants in restraint of trade were applied to contracts in general. This is the stance the Supreme Court should have taken — to jettison the restraint of trade doctrine altogether and, in its place, substitute a general unconscionability doctrine.

Traditionally, the restraint of trade doctrine is, as appears from the foregoing, based on public policy, or, the public interest. "The public interest" is a phrase of many meanings. The phrase could be used to mean "*inter alia*" the general morale and well-being of society. The reasoning arising from this interpretation of "the public interest" is that it is immoral to restrict an individual's liberty to trade. To this proposition, one may well reply with Van Den Heever J.'s words:

"To accept that an unreasonable restraint of trade may be invalid as being immoral appears to be attempting to dress Elizabeth Taylor in the clothes of a Justinian actress."¹¹⁰

More often than not, "public interest" is used in the economic sense. In its turn, this variant of "the public interest" had three facets to it. Firstly, it is said that the community, be it as an entity in itself or as an aggregation of individuals, benefits from the individual's exploitation of his skills and expertise. If each and every individual retains and exercises the freedom to do what they are best at, this promotes the societal goal of wealth-maximisation. A covenant in restraint of trade, which would have the effect of debarring the covenantor from doing what she/he is best at, would derogate from the goal of wealth maximisation. Accordingly, a restraint clause would be contrary to the public interest — hence the restraint of trade doctrine. The second facet, which is not totally unrelated to the first, is that if the individual is allowed to work as he/she chooses, he/she would, depending on the nature of the trade of course, create employment thus benefiting other members of the community directly. Both aspects of the economics argument were relied upon by Squires J. (in the High Court) in *Commercial and Industrial Holdings (Pvt) Ltd. and Another v Leigh-Smith and Others*.¹¹¹ The learned judge said:

"The country faces a severe, if not an acute shortage of skills; a shortage that grows each month. The Respondents have very considerable skills, and, moreover, those skills can generate employment for others and themselves and wealth in commensurable quantities. The evidence is that these skills can, and in fact are contributory to the country's exports. It seems to be manifest that at the present time, the public interest is better served by having more skilled people working than less, more economic activity being generated than less, and more foreign currency being earned than less."

¹¹⁰ *Drewittens Proprietary Ltd. v Carley (supra)* at 213.

¹¹¹ 1981 ZLR 647, at pp.664-5.

The idea that if a person is prohibited from pursuing one trade, society is deprived of the benefit of his/her skills is defective in that it overlooks the fact that a bar in one field releases the covenantor's potential for deployment in other fields. There is no guarantee that the trade in which the covenantor would be involved in were it not for the covenant is necessarily the one she/he is best at. As regards the generation of employment, foreign currency and other economic benefits, it is unfortunate that Squires J. does not produce facts and figures to support his conclusion. He refers to "evidence" on which there is no elaboration. How many more jobs would the Leigh-Smith's enterprise create? How many more US dollars would it generate? Looking at it from a purely theoretical standpoint, the involvement of more competitors in a particular trade does not guarantee an increased market. The result could be that the market is shared, and no more foreign currency is generated than would have been earned had the covenantor not been allowed to compete.

The same holds for employment. If the market for a commodity remains static the demand for the labour utilised in the production of the commodity is not likely to rise. Competition in such circumstances could well lead to cost-cutting restructuring measures, some of which may entail a reduction of labour costs by retrenching, and, at the same time, increasing the productivity of the employees left behind. Furthermore, the bigger a business grows, the greater the need for efficient division of labour.¹¹² Such division of labour is likely to create more employment. However, employers would be reluctant to maximise such division of labour and impart confidential information to more employees if the law did not provide a safeguard against the subsequent use of such information in competition against one. If there were no such safeguard the tendency would be to restrict severely the number of employees entrusted with confidential information and trade secrets. The law provides the safeguard through, *inter alia*, the instrument of contract — the employer can stipulate for his own protection. The restraint doctrine militates against it. It is feared that if employers are given *carte blanche* to use the instrument of contract, they will resort to it, not only to facilitate the efficient functioning of their business, but to destroy all competition thereby creating monopolies. By placing limitations on the extent to which freedom of contract may be taken, the restraint of trade doctrine prevents the creation of monopolies. This is a sound contention — as long as it is not overstated. Privity of contract is such that the only persons who are debarred, by virtue of a restraint clause, from competing with the employer are those who have contracted with him/her. Every other Tom, Dick or Harriet are free to compete as they are not contractually bound not to do so. Moreover, covenants in restraint of trade are not the most effective mechanism for the creation of monopolies. There are better ways of doing it — such as price undercutting or buying out one's most powerful competitors.

The common law restraint doctrine is not the best method of combating monopolies either. The restraint doctrine relies on litigation and the judicial

¹¹² Harlan M Black *op cit* pp.650–651.

process for its effect. The nature of the judicial process is such that judges do not go out of their way to look for, and probe into, suspect agreements. They wait for the lottery of litigation to bring them the isolated case. There is no relationship whatsoever between the cases that are brought before the courts and the importance, in economic terms, of the disputed agreements. It may well be that some of the cases that are litigated have a negligible effect on the state of the economy, while those agreements most injurious to the public are not litigated at all. The result is that the doctrine is not serving its purpose. If the prevention of monopolies, the promotion of competition and employment, and the encouragement of foreign-currency-earning enterprises are the societal goals to be pursued, it is most respectfully submitted that lawyers and judges are not the best judges in these matters. Further, the judicial process is not the best mechanism for promoting these goals. Consequently, the common law restraint of trade doctrine which depends on lawyers and judges and litigation for its impact is not serving its purpose insofar as the regulation of the economy is concerned. It should therefore be done away with.



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